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IN THE

Supreme Court of the United States

October Term, 1954

No. 388

MURRAY TALANKER,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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MISCELLANEOUS:

54 Columbia Law Review 219 12

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Murray Talanker prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on September 7, 1954.

Opinion Below

The opinion of the Court of Appeals in this case has not yet been reported. This opinion is set forth in Appendix A hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on September 7, 1954. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

The questions presented in this case involve the doctrine of multiple conspiracies as applied to a federal prosecution under an indictment in one count which charged petitioner and co-defendants as revenue agents with conspiracy to defraud the United States in the exercise of its governmental function of administering the revenue laws free from corruption and to deprive it of the honest services of petitioner and co-defendants as revenue agents; and the question of the bar of statutes of limitation as applicable to the prosecution of petitioner.

Statutes Involved

The statutes involved in this case are Title 18, United States Code, Sections 371 (62 Stat. 701) and 3282 (62 Stat. 828); Title 26, United States Code, Sections 3748(a)(1) (53 Stat. 461) and 4047(e)(4) (53 Stat. 496). The pertinent text of these statutory provisions are set forth in Appendix B hereto.

Statement of the Case

The Indictment *

Petitioner Murray Talanker and four co-defendants, O'Brien, Witt, Inkeles and Rourke, were named as defendants in an indictment, in which Zelnick and Miller were named as co-conspirators but not as defendants, charging a conspiracy in violation of Title 18, United States Code, Section 371 and Title 26, United States Code, Section 4047(e)(4), to defraud the United States of its governmental function of administering the revenue laws of the

* Page A3 of the certified typewritten record. Wherever numbers in parentheses are indicated, they refer to pages in the certified typewritten record.

United States free from corruption and its right to the honest and faithful services of the defendants as revenue agents.

The indictment in this case was filed on April 14, 1953 and alleged that the conspiracy described therein commenced on or about December 23, 1946 and continued to and including August 31, 1952. The indictment further alleged that Talanker was a revenue agent only until July 31, 1947, while all the other defendants remained revenue agents until the date of filing the indictment.

The Record

The record in this case before the Court of Appeals was a typewritten record, permitted to be filed in lieu of a printed record by order of that Court (A2). Only three copies of this record were submitted to the Court of Appeals and only one certified copy is submitted together with this petition.

The Facts

The facts in this case disclose that during July of 1946, Miller, an accountant practicing in Catskill, New York, received a letter from Talanker, then a revenue agent in the Troy, New York office, concerning the income tax returns of Spector Bros., clients of Miller (181). Miller testified that Talanker and he arranged for Talanker to give favorable treatment to the Spector tax returns in return for a bribe payment to Talanker (195-200). Although this transaction occurred at a time prior to the date fixed in the indictment for the commencement of this conspiracy (A3), nevertheless it was received in evidence (195). Only Miller and Talanker were concerned in this transaction, the other defendants not being connected with it in any way.

On June 30, 1947 Talanker's services as a revenue agent were terminated and he entered the private practice of

accountancy, in Albany, New York (1323-1324). O'Brien then became group chief at the Troy, New York office of the revenue service on September 8, 1947 (1286), with the other defendants working under his supervision. Talanker never worked under O'Brien's supervision (1318).

Thereafter the four following transactions occurred in which Miller testified Talanker participated as a private accountant, all involving accounting clients of Miller. It is to be noted that these are the only transactions involving Talanker (excluding the Spector case) out of a total of sixteen transactions of which proof was introduced:

1. *Holmes.* There is much confusion in the record as to when this transaction occurred, with government witnesses, including Miller, testifying in substance that Talanker received a bribe for helping to "fix" the tax return of H. & H. Transportation Lines of Hudson, New York (referred to in the record as the Holmes transaction) (217-219). The date of the payment of this bribe is variously fixed: the indictment alleged April 15, 1947 as the date (A6); Miller testified it occurred in February, 1948 (219). Algie, Holmes' manager, believed it was in 1947, but he was not sure (1113-1114). Nor can Algie remember the man to whom the bribe was paid (1114). Holmes cannot identify the man to whom the bribe was paid (1124), and he believes the payment occurred in early 1947 (1120). Actually Talanker was on duty in New York City during this period of 1947 (1318), while the bribe was supposed to have been paid in Albany, New York; moreover during 1948 Talanker was no longer with the revenue service. As with the Spector transaction, only Miller and Talanker are concerned in the Holmes matter. However, the testimony does not clear up the contradictions.

2. *Acme.* In the Acme case, Miller testified that during December, 1948 (225) the Acme Glove Corporation, one of Miller's clients, was about to have its tax returns exam-

ined and that for this reason he procured Talanker to have O'Brien replace the agent on the case (226) with the co-defendant Rourke (229) in order to facilitate a "fix". However, this substitution of agents actually occurred on October 22, 1948 (240, 244), or more than two months before Miller's claimed contact with Talanker for this purpose. Money paid to Miller (236) then was allegedly shared equally by Talanker, O'Brien and Rourke. Talanker testified he was retained in this case by Miller as a tax consultant (1334), while the jury acquitted Rourke of any participation in this conspiracy (1852). In addition Miller also testified that he first met O'Brien (through Talanker) in June, 1949 (293).

3. *Bell.* Miller here testified that Bell retained him in March, 1949 in connection with Bell's 1946 tax return (282). Thereafter Miller telephoned Talanker (283) in connection with the case, and they met in Talanker's office (284). Witt was assigned to the case on April 25, 1949 (290) and thereafter when Miller first met O'Brien (293), O'Brien gave him Bell's file (294). Thereafter Witt prepared a report in this case under Talanker's direction at Talanker's office (295-296). Miller further testified that he gave Talanker $1,000 to be shared among Talanker, O'Brien and Witt (297). Bell never met Talanker and Talanker denied the entire transaction (1339).

4. *Van Loan.* Van Loan was a client of Miller, operating a market advisory service, out of Springfield, Mass. (325). In September, 1949, Van Loan advised Miller that the Boston office of the revenue service had written concerning his 1947 tax return (326, 628). Miller testified he called Talanker who suggested having the file transferred to the Troy office (326). When the file was transferred Witt was assigned to the case (327) and for $1,000 (328) to be shared among Miller, Witt, Talanker and O'Brien (329), no additional tax was found (328). Van Loan testified he

never met Talanker, never heard his name and that all his dealings were with Miller (632). Talanker denied any knowledge of the transaction or that he ever heard of Van Loan (1340).

From every other transaction Talanker was deliberately excluded, and nothing further concerning Talanker and "tax fixes" is heard in this case.

Of the twelve other transactions introduced into evidence, Talanker played no part and no claim to the contrary was made by the government. Of these twelve, the co-conspirator Zelnick, also a revenue agent, working under O'Brien's direction in the Troy office, gave testimony on seven or eight cases. Zelnick testified he knew nothing about Talanker's part in any case. Indeed the case against Talanker included the evidence of Zelnick's corruption by Miller (246-255). This corruption occurred after Miller met Zelnick, when Zelnick was assigned the tax return of Oppenheimer Bros., a Miller client. In this entire series of transactions, Zelnick, Miller and O'Brien alone were involved. In two separate transactions involving Witt and three other separate transactions involving Inkeles, Talanker again was not involved in any way.

The first transaction in the entire case, one involving Talanker, the Spector case, occurred in the summer of 1946, or more than five months before the date alleged in the indictment as the beginning date of the conspiracy (December 23, 1946). The trial court admitted the evidence of the Spector case, over defense objections, under a theory that it constituted proof of the formation of the conspiracy, with the prosecution promising to connect it with the other transactions (97). The next date of any transaction was the Holmes case, which occurred either in February 1947 or February 1948, but no connection between it and the Spector case was ever established. It is questionable if any transaction other than the Spector case, involving

Talanker as a revenue agent, was proved. And only Talanker and Miller were involved in the two early cases, since O'Brien and the other revenue agents were not connected in any case until December 1948, according to Miller's testimony.

If the Holmes case happened in February 1947 (not April 15, 1947, as alleged in the indictment), while Talanker was yet a revenue agent, O'Brien could not have been involved (as Miller says he was) since O'Brien did not come to Troy as group chief until September 1947; if it happened in February 1948, then Talanker could not be charged as a revenue agent, with an applicable six year statute of limitations; rather he would have to be charged as a private citizen, with a three year statute of limitations applicable to any offense of conspiracy.

The last transaction in which Talanker is named was the Van Loan case in September 1949. The indictment in this case was filed on April 14, 1953, or more than three and one-half years after any alleged participation of Talanker as a private citizen in any case of so-called "tax fixing." If the Holmes case occurred in February 1947, while Talanker was a revenue agent, then this last transaction as a revenue agent occurred more than six years before the indictment in this case was filed.

In delineating the facts of this case, the confessions of Miller and Zelnick, the principal government witnesses, as to Zelnick's corruption by Miller (250) must assume major proportions. In November 1948, Zelnick was assigned the tax return of Oppenheimer Bros., a Miller client. Miller offered Zelnick a bribe, which after some persistence by Miller, Zelnick accepted. Thereupon the Oppenheimer return was fixed. To convince Zelnick that he could safely accept bribes (250), Miller suggested that O'Brien, Zelnick's chief, should be brought into the arrangement; or even if necessary that Talanker, then a practicing accountant in

Albany, could be brought into the picture. However, Zelnick never talked to Talanker (850) and with Talanker specifically excluded, Miller, Zelnick and O'Brien alone shared bribes in Zelnick's cases (794-795).

Thereafter Zelnick and Miller alone, as both admitted, obtained bribes for fixing tax returns in the following cases: Hotel New Walters (298-301); Osborne House and Hensenville Meat Market (354-362); Van Loan*; Ingalls (368-373); Page (349-351); Krauss (374-376); De Stefano (376, 839). Talanker had no part in any of these cases. The first of these "fixes" occurred at about the time of the last case mentioning Talanker.

It was as a result of the De Stefano extortion (770) that both Miller and Zelnick were indicted, tried and convicted separately from the present indictment (168, 769), and they were held unsentenced so as to be used as witnesses in this case (168, 770). They were the principal government witnesses in this case.

In the cases in which Inkeles acted as revenue agent, Miller again was the accountant. O'Brien, Miller and Inkeles alone were involved (274, 314). These cases were the Barlow (270-274), Brown (306, 312-314) and McQuade (316-325) cases. Talanker had no part in any of these cases and was specifically excluded therefrom. These cases occurred from June to September 1949.

Similarly for two other cases in which Witt was the agent; these were the Levison (341-347) and Reis (363-369) cases, and again Talanker was excluded. These cases too

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*The *Van Loan* case involving Zelnick (329-330) was the second time this taxpayer was asked for bribe money for the same tax return. Miller admittedly falsified Van Loan's return by excluding $40,000 income therefrom (636-637) and Zelnick demanded money to fix the return (331-332). Miller obtained this money although Van Loan protested this was the second bribe (332). Talanker was completely excluded from the second affair (332).

occurred at a time after the last case in which Talanker was mentioned.

The only time during the entire period covered by this case when all the so-called conspirators met and were together was at a party given by Miller at his home in Catskill, New York, in the Spring of 1950 (840), at which all the wives also were present (841). The testimony concerning this party was that it was only a social affair and that nothing improper occurred or was related to the so-called "tax fixes."

This entire case stems from the conduct of one man—Miller (1768). Miller admittedly was a confessed criminal (168-171, 401-409), extortionist (376, 410-411, 839), and liar (461). He alone was involved in every transaction brought out in this case; he admittedly corrupted Zelnick (250), falsified Van Loan's tax return (636-637) and brought every other defendant into the case. In many instances his testimony alone was used to establish instances of corruption. His testimony is replete with contradictions, admitted falsehoods and errors of fact on vital details. The theory of the single conspiracy under which this indictment was obtained and the case tried, is the theory of Miller's sinister conduct corrupting others.

In only one instance did Talanker attempt to assist Miller and Zelnick in this entire case. When the Special Agents of the Treasury Department interrogated Miller and Zelnick about the De Stefano case (376), they went to Albany to seek aid from O'Brien (377, 842) and Talanker (380-382, 844). Talanker offered to obtain a lawyer for them; his assistance ended there (382, 845). This occurred in March, 1951 (376, 842).

Subsequent to the trial, at which Talanker, O'Brien, Witt and Inkeles were convicted (1853), and before sentence, O'Brien became deceased (1857). Rourke was acquitted by the jury (1853).

Reasons for Granting the Writ

The questions presented by this case are of great importance in the administration of Federal criminal law. The two questions to be presented are interrelated. The primary question is the effect of joining petitioner Talanker in one single-count conspiracy indictment with the other defendants, where the proof discloses that two or more separate conspiracies were established. The second question is the effect of statutes of limitation upon the prosecution of petitioner, with two different statutes of limitation being applicable depending upon whether petitioner was a revenue agent or a private citizen at the time of the ending of the conspiracy in which he participated.

1. The proof in this case shows that at least two, if not more than two, separate conspiracies existed during the period covered by this indictment. In the first such conspiracy Talanker and Miller are involved. The cases they worked on were the Spector and Holmes cases, while Witt was involved in the Van Loan and Bell cases and Rourke supposedly in the Acme case. O'Brien is mentioned in the Acme, Bell and Van Loan cases. All transactions with Talanker ended in September 1949, when Zelnick, Miller and O'Brien were operating their own "fixing" conspiracy in all the cases which were assigned to Zelnick. Talanker was specifically excluded from all the Zelnick cases and the five other Witt and Inkeles cases. Talanker actually was specifically excluded from all Inkeles cases.

From Miller's testimony it is clear that he was the "hub" of the different conspiracies. O'Brien too may have been closely allied with Miller, according to Miller, but their separate enterprise included only those agents O'Brien assigned to a particular Miller case. Talanker was no longer a revenue agent when O'Brien became the Troy group chief, and hence in no instance did Talanker work on

a case under O'Brien's direction, the assistant United States Attorney's summation to the contrary notwithstanding (1768). Of sixteen cases within the period of the indictment, Talanker is mentioned in four; the other twelve saw him not participating in any way.

The situation in this case is analogous to the *Kotteakos* case (*Kotteakos* v. *United States*, 328 U. S. 750). There was not here any overall common purpose and general knowledge of the existence of a single conspiracy, which the cases state are required for the trial of a series of transactions as a single unified conspiracy. The Court of Appeals likened this case to the *Blumenthal* case (*Blumenthal* v. *United States*, 332 U. S. 539), but our examination of the facts in that case with this one shows that they are not at all similar. In the *Blumenthal* case the single unifying purpose of the conspiracy was the disposal of a large amount of whiskey at over the ceiling prices. There each of the salesmen involved knew or must have known that others unknown to them were sharing in so large a project. The conspiracy had one definite object and all the co-conspirators joined in achieving that object. In the present case there was no specific unified object. At best each corruption or each tax fix was an *ad hoc* affair. It cannot be said that every corruption of a revenue agent in the Troy office or every fixing of a taxpayer's return disclosed a specific unified object. In the situation of the cases assigned to Zelnick, it may be that O'Brien, Miller and Zelnick had a single unified purpose of fixing Zelnick's cases, but that does not mean that every other case of corruption discovered in the Troy office was a part of that integrated conspiracy. The situation of Talanker more closely resembles the cases of *Canella* v. *United States*, 157 F. 2d 470, and *Brooks* v. *United States*, 164 F. 2d 142, than the *Blumenthal* case.

The "common end" of the single conspiracy described in the *Blumenthal* case, is to be distinguished from the "separate ends similar in character" of multiple conspiracies, *United States* v. *Rosenberg*, 195 F. 2d 583, 600, cert.

den. 344 U. S. 838. This case clearly is of the latter kind. See *United States* v. *Andolschek,* 142 F. 2d 503, 507. 54 Columbia Law Review 219, 228-231.

Where multiple conspiracies are shown by the evidence to exist, prejudice results from joining them in one indictment and trial. *Kotteakos* v. *United States,* supra. The variance between indictment and proof thus affects substantial rights of an accused, *Berger* v. *United States,* 295 U. S. 78, *Kotteakos* v. *United States,* supra. In this case it is clear that proof of the admitted criminal conduct of Miller and Zelnick, in their separate conspiracy with O'Brien, seriously prejudiced Talanker in his right to an impartial trial free from the odium of the admitted extortions of Miller and Zelnick. Since the indictment did not charge any conspiracy to corrupt Zelnick as an agent, then it follows also that proof of Zelnick's corruption prejudiced Talanker.

The evidence of the conversations among Zelnick, Miller and O'Brien in relation to the De Stefano case, which concededly was not part of the conspiracy alleged in the indictment, likewise prejudiced this petitioner. *Logan* v. *United States,* 144 U. S. 263, 309; *Brown* v. *United States,* 150 U. S. 93; *Fiswick* v. *United States,* 329 U. S. 211, 216-217; *Krulewitch* v. *United States,* 336 U. S. 440, 442-443. As in the *Krulewitch* case, this conversation was treated as an effort to cover up the crimes of Miller and Zelnick, not a part of this case or any conspiracy involving Talanker, and occurred more than one and one-half years after any claimed activity by Talanker in any conspiracy.

This entire record is permeated with the criminal conduct of Miller and Zelnick alone and it is hard to conceive that this petitioner could receive a fair trial under such circumstances; that he did not is evident from the record. See *United States* v. *Falcone,* 109 F. 2d 579, 581, affirmed 311 U. S. 205.

2. The second question presented in this case is the effect of statutes of limitation upon the prosecution of petitioner, with two different statutes being applicable depending on whether petitioner was a revenue agent or private citizen at the date of the ending of the conspiracy in which he participated. It is not disputed by petitioner that if this Court holds that there is only one conspiracy proved in this case, then there is no bar of the statutes of limitations, for it is clear that insofar as others of the defendants are concerned there were overt acts involving them subsequent to April 14, 1950, which is three years prior to the date of the filing of this indictment on April 14, 1953.

The indictment cites two statutes basically as the source of the jurisdiction for the charge of conspiracy herein. These are the general conspiracy statute, Title 18, United States Code, Section 371 (and its predecessor old Section 88, with which there is no substantial distinction applicable here) and the revenue agent's conspiracy statute, which is part of the Internal Revenue Code, Title 26, United States Code, Section 4047 (e)(4).

Each of these criminal statutes has a separate statute of limitations. For the general conspiracy statute the period of limitations is three years, as fixed in Title 18, United States Code, Section 3282. For the revenue agent's conspiracy statute the period of limitations is six years, as fixed in Title 26, United States Code, Section 3748 (a)(1). See Appendix B, *infra*.

To the extent that petitioner is charged with conspiracy while he was a revenue agent, the only transaction in which he participated clearly as a revenue agent was the Spector case. The Spector case was fully completed and over during July 1946, and Miller testified that this was a single isolated transaction, unrelated to any other transaction with no plan or agreement between he and Talanker for the future. The only other possible matter affecting petitioner

as a revenue agent was the Holmes case, and here there is great ambiguity in the record whether it occurred in February 1947 or February, 1948. If it occurred in February 1947, while Talanker was a revenue agent, it too occurred more than six years before the filing of the indictment. If it occurred during February 1948, then Talanker was no longer a revenue agent and it would be chargeable against him as a private citizen, with the three year period of limitations being effective.

The Court of Appeals in its opinion assumed *arguendo* that the six year statute applied solely to crimes by revenue agents and does not extend to others even if the latter conspired with such agents. The Court of Appeals also added that there is no proof of overt acts by the conspirators during that period of 1947 before Talanker ceased to be a revenue agent*. It is submitted that the law is clear that conduct as a revenue agent only falls within the six year period, while conduct as a private citizen carries only the three year period of limitations. See *United States* v. *McConnell,* 10 F. 2d 973; *United States* v. *McDonald,* Fed. Case No. 15,670; *United States* v. *Gerdel,* 103 F. Supp. 635, 637-638. See *Braverman* v. *United States,* 317 U. S. 49, 54.

Of course the indictment charges petitioner as a revenue agent *only* and accordingly only the six year statute of limitations should apply to him. The subsequent conduct as a private citizen is not charged against petitioner, and the citation of statutes in the indictment, including Title 18, United States Code, Section 371, has no legal effect upon the facts pleaded therein. *Williams* v. *United States,* 168 U. S. 382, 389.

If the three year statute of limitations should apply to petitioner, then since there was no conspiracy of which petitioner was a member in force subsequent to April 14, 1950,

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* See page 24 of Appendix A, *infra.*

the indictment must fail. The test of the continuance of a conspiracy is the date of the last overt act proved; it is presumed to end at that time. *Fiswick* v. *United States, supra,* p. 216. *Brown* v. *Elliott,* 225 U. S. 392, 401.

Since Talanker's part in any conspiracy of which he was a member as a private citizen ended during the summer of 1949, clearly this too was more than three years before the indictment was filed.

The government has argued that petitioner's presence, with his wife and the other defendants and their wives, at the party given by Miller during the Spring of 1950, constituted conspiratorial conduct. There are two answers to this contention. First, the date of this party has not been definitely established and the party may have been held prior to April 14, 1950. Secondly, to hold the attendance of the defendants in this case at Miller's party to be part of the conspiracy would violate the rule stated in *Logan* v. *United States, supra,* and *United States* v. *Goldberg,* Fed. Case No. 15,223, since attendance at the party was devoid of any reference or statement that it was part of the conspiracy or in furtherance of its objects, and hence is as consistent with innocence as with guilt. See *United States* v. *Johnson,* 165 F. 2d 42, 47-48.

The other fact seized upon as constituting conspiratorial conduct is Miller and Zelnick's appeal to petitioner for help in their own case. This clearly was not part of any conspiracy in which Talanker participated, or even of the conspiracy ostensibly proved in this case. Further, this Court has held in the *Krulewitch* case, *supra,* pp. 443-444, that efforts to conceal a crime do not create a subsidiary phase of conspiracy as part of an implied agreement to conceal and hence do not toll the statute of limitations after the last overt act of that particular conspiracy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Certificate of Service

I, SAMUEL MEZANSKY, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the day of October, 1954, I served copies of the foregoing petition for a writ of certiorari on the United States of America, Respondent, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid, to The Solicitor General, Department of Justice, Washington, 25, D. C., and the United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York 7, New York.

Dated, October , 1954.

SAMUEL MEZANSKY,
Counsel for Petitioner.

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 269—October Term, 1953.

(Argued June 9, 1954 Decided September 7, 1954.)

Docket No. 23073

UNITED STATES OF AMERICA,

Appellee,

—v.—

DAVE WITT, ABRAHAM INKELES and MURRAY TALANKER,

Appellants.

Before:

CHASE, *Chief Judge,* and
FRANK and HINCKS, *Circuit Judges.*

Appeals from a judgment of conviction entered by the United States District Court for the Southern District of New York, Judge Goddard presiding. AFFIRMED.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York (Howard A. Heffron and Leonard B. Sand, of counsel) *for appellee.*

MURRAY E. GOTTESMAN (Albert A. Blinder and John M. Foley, of counsel) *for appellants Witt and Inkeles.*

BENENSON AND ISRAELSON (Aaron Benenson, of counsel) *for Talanker.*

Appendix A

FRANK, *Circuit Judge*:

The indictment, under which appellants were tried, charged that O'Brien, Talanker, Witt, Inkeles and Rourke, former Internal Revenue Agents, named as defendants, and Zelnick and Miller, named as co-conspirators but not as defendants, conspired together, in violation of 18 U. S. C. Section 371 and 26 U. S. C. Section 4047(e)(4), from about December 23, 1946 until August 31, 1952, "to defraud the United States" and also "to defraud the United States in its governmental function of administering the revenue laws of the United States" free from corruption and its right to the honest and faithful services of the named revenue agents. The indictment alleged in effect that the conspiracy consisted of illegally demanding sums from taxpayers to each of whom it was represented that serious discrepancies existed between his books and his reported income, and that if he paid the demanded sum, a favorable report of his tax examination would be made.

There was evidence from which the jury could reasonably find the following: The conspiracy originated during July of 1946 when Miller, an accountant practicing at Catskill, New York, received a letter from Talanker, then an Internal Revenue Agent, stating that the income-tax returns of Spector Bros. (one of Miller's clients) were under examination. Talanker, on a visit to Miller, informed him that Spector had failed to include some $60,000 of income in its returns. Together, Miller and Talanker went to see Spector who, after discussing the deficiency, agreed to pay $3,000 for a favorable tax report. Several weeks later, Spector, refusing to pay any more than $1500 as a bribe, gave that sum to Miller in Talanker's presence. As was agreed, Talanker put through a favorable report on the Spector case.

Sometime during 1947, Miller contacted the officers of the H. & H. Transportation Lines, and showed them his notes indicating that the company's tax would be well over $10,000.

He then stated that the whole thing could be cleared up for $5,000 cash. A few days later, Holmes, president of H. & H. Transportation Lines, drove with Miller to 73 Winthrop Street in Albany, New York, where he paid $5,000 to an agent whom he could not positively identify at the trial. Talanker admitted that he lived at 73 Winthrop Street. Miller positively identified Talanker as the man to whom Holmes gave the money.

Talanker left the Internal Revenue Department on June 30, 1947. In August 1947, O'Brien, who died after sentence, became Chief of the Internal Revenue Department's office at Troy, New York.

Sometime during the latter part of 1948, Miller learned that Acme Glove Corporation, another of his clients, was about to undergo an examination of its corporate tax returns by an agent named Nudelman whom Talanker characterized as a "tough agent." Miller contacted Talanker; Talanker promised to get in touch with O'Brien and have the case assigned to another agent. Talanker and Miller then called on Snyder, Vice-President of Acme Glove Corporation, who agreed to pay $3,000 for a favorable examination. On October 30, 1948, when Miller and Talanker appeared with Agent Rourke, Snyder gave $3,000 to Miller in Talanker's presence. According to Miller, Talanker, Rourke and O'Brien shared the $3,000 equally.

The tax returns of Oppenheimer, a Miller client, were assigned to Agent Zelnick for investigation in November of 1948. Miller cultivated Zelnick during the period November 1948 to March 1949, and finally, in March, persuaded Zelnick to "fix the case." Miller then conferred with Oppenheimer and suggested to him that he offer Zelnick a bribe. The price agreed on was $1,000. After speaking to O'Brien, Zelnick replaced pages 3 and 4 of the Oppenheimer return with new pages so that no additional tax was due.

Appendix A

The tax return of Orloff C. Barlow was "fixed" by Miller, Inkeles and O'Brien in June of 1949. During that month, Miller approached Talanker on the subject of the tax return of Ernest Bell, for the purpose of having Talanker arrange to have another agent substituted for the one then investigating Bell's tax returns. During this period, Talanker introduced Miller to O'Brien; O'Brien gave the file on Bell to Miller and instructed Miller to see Witt about it. Witt, under Talanker's direction, wrote out a report in Talanker's office. Miller, also under Talanker's direction, collected $1,000 from Bell. Talanker, Witt, Miller and O'Brien shared the $1,000 paid by Bell.

During the summer of 1949, the return of the New Hotel Walters, Inc. (a Miller client) was assigned to Zelnick for investigation. Miller, Zelnick and O'Brien shared the $2,000 paid by this taxpayer for a favorable examination. Inkeles received $1,000 for "preparing" the return of Dr. Brown; this sum was divided among Miller, Inkeles and O'Brien. Toward the end of 1949, Miller, Inkeles and O'Brien shared the $2,000 received for "fixing" Dr. McQuade's return.

Van Loan, a client of Miller's, informed Miller, sometime during 1949, that his (Van Loan's) returns were under investigation in the Boston Office. Talanker told Miller to have the case transferred to the Troy Office. Later, Talanker informed Miller that Witt had been assigned to the case. After examining the taxpayer's 1947 return, Talanker ordered Witt to write a favorable report. Miller was instructed by Talanker to obtain $1,000 from the taxpayer. Miller, Witt, Talanker and O'Brien shared this "fee." Zelnick handled Van Loan's 1948 tax return, and, with Miller's help, obtained $800 for this "fix."

The Levison return was examined by Witt in December of 1949. Miller, Witt and O'Brien shared the $1,000 paid by Levison. In that same month, Miller and Zelnick collected $750 from Dr. Page.

Appendix A

From June of 1950, when Talanker, Witt, Inkeles, Zelnick, O'Brien and their wives were all present at a party given by Miller, until January of 1951, five cases were "fixed." Zelnick and Miller obtained $3,500 for "fixing" the Osborn return. Witt and Miller were paid $1,000 for "fixing" the Reis return. Miller and Zelnick "fixed" the Krauss and Ingalls returns. During this period, the 1948 Van Loan return was "fixed."

In January of 1951, Miller and Zelnick approached De Stefano Bros., although the De Stefano returns were not under investigation by any government agency. They succeeded in getting $3,000 from De Stefano Bros.

Both Miller and Zelnick testified for the prosecution in the present case. Talanker, Witt, Inkeles and O'Brien were found guilty and sentenced. Rourke was acquitted. O'Brien died subsequent to sentencing. Talanker, Witt and Inkeles have appealed from the judgment of conviction.

1. Talanker contends that the proof shows not one conspiracy but a number of separate conspiracies to some of which he was not a party, and that, accordingly, we must reverse, pursuant to *Kotteakos* v. *United States,* 328 U. S. 750. We do not agree. There was evidence from which the jury could reasonably conclude that appellants, together with Miller, O'Brien and Zelnick, formed a single "ring," the aim of which, known to all the conspirators, was, for a "fee" in each instance to "fix" real or purported government claims based on defective income-tax returns and thus to defraud the United States; and that the operations of this single over-all conspiracy had a continuing character. It is not inconsistent with that conclusion that any particular "fix" was conducted by particular conspirators, or was not known to all the conspirators, or that the "fee" exacted in each "fix" was retained by those of the conspirators who participated in that "fix." We think *Blumenthal* v. *United*

States, 332 U. S. 539, 558, governs here. See *United States* v. *Ganey,* 187 F. (2d) 541 (C. A. 2).

2. Talanker alleges error in the reception of evidence of the Spector "fix," in which he and Miller participated, because it occurred in 1946, before December of that year, the earliest date named in the indictment as to the existence of the conspiracy. We think this evidence properly admissible to show the way the conspiracy came into being and its *modus operandi* when it operated. See *United States* v. *Dennis,* 183 F. (2d) 201 (C. A. 2); *Heike* v. *United States,* 227 U. S. 131.

Witt and Inkeles assert that, as against them, it was error to admit that evidence and also evidence of the Holmes "fix," since both those transactions occurred without their knowledge and before the time when (according to the government) these defendants became conspirators. We think there was no error. This evidence tended to show the nature of the conspiracy in existence when these defendants joined it. *Lekacos* v. *United States,* 151 F. (2d) 170 (C. A. 2), reversed on other grounds *sub nom. Kotteakos* v. *United States,* 328 U. S. 750; *Lefco* v. *United States,* 74 F. (2d) 66 (C. A. 3).

3. We see no merit in Talanker's contention that, as to him, the judge erred in admitting the testimony of the bribing of Revenue Agent Zelnick, because the indictment did not specifically charge that Talanker conspired to corrupt Zelnick. Talanker, as a member of the single, comprehensive conspiracy, was responsible for the acts of his coconspirators which formed a part of their joint undertaking. *United States* v. *Kissel,* 218 U. S. 601.

4. The indictment named, as violated statutes, 26 U. S. C. Section 4047(e)(4) and 18 U. S. C. Section 371 (formerly 18 U. S. C. Section 88). Under 26 U. S. C. Section 3748, the

statute of limitations applicable to 26 U. S. C. Section 4047(e)(4) is six years; under 18 U. S. C. Section 3282, the period applicable to 18 U. S. C. Section 371 is three years. Talanker contends—and we assume *arguendo*—that 26 U. S. C. Section 4047(e)(4) relates solely to crimes by revenue agents and does not extend to others even if the latter conspired with such agents. There is no proof of overt acts by the conspirators during that period of 1947 before Talanker ceased to be a revenue agent. Later, as an accountant in private practice, he actively participated in the conspiracy in 1949 but not later. On these facts, he contends that, when the indictment was filed, on April 14, 1953, the three-year statute of limitations (18 U. S. C. Section 3282) had run.

We do not agree. There is ample evidence that other members of the conspiracy committed overt acts as part of the conspiracy after April 14, 1950. Since Talanker failed to prove, and there is no evidence, that he ever affirmatively disassociated himself from the conspiracy, he must be deemed to have remained a party to it subsequent to April 14, 1950.[1] Accordingly, since he was liable as a private person under 18 U. S. C. Section 371, the three-year statute had not run in his favor when the indictment was filed. As the indictment stated that he ceased to be a revenue agent in 1947, and cited 18 U. S. C. Section 371, we think it sufficiently charged him in his capacity as a private person.[2]

5. Witt and Inkeles complain that the prosecutor, in his opening statement to the jury, failed to state the character

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[1] *Hyde* v. *United States*, 225 U. S. 347, 369; *Pinkerton* v. *United States*, 328 U. S. 640, 646; *United States* v. *Compagna*, 146 F. (2d) 524, 527 (C. A. 2); *United States* v. *Cohen*, 145 F. (2d) 82, 90 (C. A. 2); *United States* v. *Markman*, 193 F. (2d) 574, 576 (C. A. 2).

[2] As noted below, neither he nor any of the other defendants sought a bill of particulars.

of the entire conspiracy, to read the indictment, and to refer to the names of government witnesses other than Miller and Zelnick. Not only in our opinion was this statement adequately informative,[3] but none of the appellants objected to it at the time.

6. One of the jurors, during the trial, asked whether defendants who had not sought a bill of particulars might have done so and thereby obtained government evidence before the trial. We think the judge answered the question satisfactorily: he made it clear that no adverse inference should be drawn from the failure of defendants to seek such a bill.

7. During the trial, some of the jurors, with the judge's consent, put questions to witnesses and received answers. We think that a matter within the judge's discretion, like witness-questioning by the judge himself, as to which see *United States* v. *Rosenberg,* 195 F. (2d) 583, 593-594 (C. A. 2).

8. One juror, during the trial, went to the library to see "if he could find out about the ethics of a lawyer in taking cases." The prosecutor informed the judge and defense counsel of this fact. The judge sent for the juror who told the judge in chambers that "he could not find what he was looking for," that he had formed no opinion concerning the case, that he "had not told any of his fellow jurors" about his investigation, that nothing he had found "would affect him," and that "he would take the law from the court." Nevertheless, the prosecutor moved that this juror be excused and an alternate juror substituted. After consulting the defendants, defense counsel stated that they did not join

[3] Again it is pertinent that, as noted below, none of the defendants sought a bill of particulars.

in the prosecutor's motion, which the judge denied. It is incomprehensible that defendants should now assert error in this respect.

9. Nor do we agree with the defendants that the judge erroneously "appealed" to the jury to convict them in that part of his charge quoted in the footnote,[4] which is substantially similar to the charge we approved in *United States* v. *Hiss*, 185 F. (2d) 822 (C. A. 2).

AFFIRMED.

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[4] "Now, ladies and gentlemen, if you find that the evidence respecting the defendants, or a defendant, is as consistent with innocence as with guilt, such defendant or defendants should be acquitted. If you find that the law has not been violated, you should not hesitate for any reason to find a verdict of acquittal. But, on the other hand, if you find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty, as a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this."

Appendix B

Title 18, United States Code, § 371. Conspiracy to commit offense or to defraud the United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Title 18, United States Code, § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. June 25, 1948, c. 645, 62 Stat. 828.

Title 26, United States Code, § 3748. Periods of limitation

(a) Criminal prosecutions. No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner. * * *

Title 26, United States Code, § 4047. Penalties

(e) Other unlawful acts of revenue officers or agents. Every officer or agent appointed and acting under the authority of any revenue law of the United States

(4) Who conspires or colludes with any other person to defraud the United States;

shall be dismissed from office, shall be fined not less than $1,000 nor more than $5,000, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court. The provisions of this subsection shall apply to internal revenue agents as fully as to internal revenue officers.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 388

MURRAY TALANKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 18–25, R. 1875–1882) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 7, 1954 (Pet. 17, R. 1874). The petition for a writ of certiorari was filed on October 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there was evidence of a single conspiracy to defraud the United States in the administration of its revenue laws.

STATUTES INVOLVED

The pertinent statutes provide:

18 U. S. C. 3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

26 U. S. C. 3748:

> No person shall be prosecuted, tried, or punished, for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, except that the period of limitation shall be six years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, * * *.

26 U. S. C. 4047 (e) (4):

> (e) * * * Every officer or agent appointed and acting under the authority of any revenue law of the United States—
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> * * * * * *
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> (4) Who conspires or colludes with any other person to defraud the United States;
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> * * * * * *
>
> shall be dismised from office, shall be fined not less than $1,000 nor more than

$5,000, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court. The provisions of this subsection shall apply to internal revenue agents as fully as to internal revenue officers.

STATEMENT

Petitioner, among others, was convicted of conspiracy to defraud the United States in the exercise of its governmental function of administering the revenue laws free from corruption and dishonesty. He was sentenced to imprisonment for three years and fined $2,000 (R. 1853, 1864). On appeal, the judgment was affirmed (R. 1874).

The evidence for the government may be summarized as follows:

From 1943 to 1947 petitioner was an internal revenue agent at Troy, New York, a branch of the Albany, New York, office (R. 1318). On June 30, 1947, he resigned from government service and entered upon the private practice of accountancy (R. 1323–1324). Miller was engaged in the private practice of accountancy in Catskill, New York, which was within the juris-

diction of the Albany office (R. 166, 167). O'Brien had been a revenue agent since 1923 and assumed the duties of group chief in charge of the agents in the Troy and Kingston offices in September 1947 (R. 773, 1283, 1286). The other defendants were, at various times, agents in the Troy and Kingston offices (R. 768–773, 1392–1393, 1403–1404, 1467, 1525). The internal revenue agents' work consisted of the examination of the books of taxpayers whose returns were questioned and the preparation of reports and recommendations. The group chief assigned the cases to the agents and reviewed the reports submitted by them before he forwarded the reports to Albany for another review. (R. 60–66, 67.)

To show the inception of the conspiracy, the government was allowed to introduce in evidence (R. 178) the circumstances surrounding the "fixing" of the tax examination of Spector Bros., Inc., in July 1946, six months prior to the beginning in December, 1946, of the conspiracy alleged in the indictment. After Miller was retained to represent the company in the pending tax examination by petitioner, he and petitioner went to Spector's office at Germantown, New York, where the books were kept. While petitioner was examining the books, there ensued a discussion[1] as to whether a "fix" of federal taxes

[1] Miller testified that Spector initiated the discussion (R. 195–196) while Spector testified that Miller and petitioner initiated the discussion (R. 1068–1069).

could be arranged. During the discussion, petitioner proposed to make a favorable report of little or no taxes for a payment of $10,000, but finally agreed to a lower figure. He wrote a favorable tax report. The evidence is contradictory as to the amount of the bribe, but some money was paid and petitioner received some automobile tires. (R. 174–200; 1070–1071.) There was no evidence as to the distribution of the money.

When petitioner left the government in June 1947, he continued his association with Miller, to whom he said that his severance with the Internal Revenue Service (R. 206) "didn't make any difference, that he would still be well connected with the Treasury Department" (R. 205–206, 1324). Miller agreed to contact petitioner if "anything came along that I [he] could not handle" (R. 206–207).

Thereafter the cases of fifteen taxpayers, all clients of Miller, were "fixed." We discuss in detail only those in which petitioner was directly involved.

H. and H. Transportation Lines. The date of this case is not clear from the evidence, being placed as either early in 1947 by its officials (R. 1114, 1120) or early in 1948 by Miller (R. 208, see also R. 1332–1333).[1] At the time of the ex-

[1] The date is immaterial for the purposes of this petition for there is no doubt that petitioner was involved either as the examining agent or as a consultant with Miller (R. 1183, see also Pet. 4).

amination, Miller received a call from the company about a pending tax examination. He told them not to "worry about it" since he "had some connections" (R. 1113–1114). He contacted petitioner and asked his assistance. Thereafter petitioner and Miller went to the company's office where petitioner agreed to look into the matter and let the officials know what could be done. After investigating the matter, petitioner met again with Miller and the company officials and told them that a conscientious audit would show a tax of $14,000 and he could fix a no-tax report for $5,000. The company officials delivered that amount to petitioner's home in Albany in Miller's presence. Petitioner paid Miller $1,500. (R. 208–213, 216–220, 1114–1117, 1120–1134.)

Acme Glove Corporation. Toward the end of 1948, when the company's 1946 return was under examination by revenue agent Nudelman, Miller told Mr. Snyder of the company that he knew (R. 225) "somebody that might be able to help him in this situation." Miller then contacted petitioner, who was then in private practice. Petitioner advised Miller that Nudelman was a "tough agent" and that he would talk to O'Brien about having the case reassigned to a more suitable agent. Following a conference between Snyder, Miller, and petitioner as to the manner of handling the case and as to the amount to be paid for the "fix," petitioner said that he would

"arrange for the examination to take place." Subsequently, the case was assigned to Rourke, who, with Miller and petitioner, drove to the company's office where Rourke conducted the examination. During the examination, petitioner advised Miller that he would tell Rourke to assess a small deficiency to avoid suspicion. Rourke prepared a report on that basis. Snyder gave $3,000 to Miller, who gave it to petitioner. Petitioner gave Miller $750, asked Miller for $50 to give to O'Brien's secretary for his [petitioner's] "access to" O'Brien's files and said that out of the $2,250 which he retained he would give something to O'Brien.

Oppenheimer Brothers, Inc. About November 1948, Miller learned that Zelnick, a new agent, was examining Oppenheimer returns which Miller had prepared. Miller approached Zelnick on fixing the case. When Zelnick said that he was a new agent and did not know anything about that, Miller told him that he had been working with other agents and with O'Brien (R. 778) and had "personal instances where tax cases" were fixed. When questioned as to how "these things were done," Miller said that out of a $1,000 fixing fee "usually the accountant would get $300, and the balance would be divided between the agent and the group chief." (R. 249.) Zelnick was not interested. A few days later, Miller again tried to persuade him to join in the scheme by telling

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him to speak to O'Brien about it and that he [Miller] had such dealings with petitioner and that if Zelnick (R. 250) "wanted to become familiar with the way things were done in these matters" Miller would introduce him to petitioner. Zelnick remained disinterested. Several months later, however, in the spring of 1949, Zelnick finally agreed to fix for $4,000 the questioned Oppenheimer returns. Since the company had left out completely in its questioned return its liquidating dividends for the year of dissolution, it was necessary, in order to prepare a favorable tax report, to substitute new pages in the original return and to include this information. When Zelnick exhibited reluctance to making such a change and reluctance to discuss a "bribe" with O'Brien, Miller said (R. 794) "If you are afraid, I will call in Murray Talanker and Murray will speak to Maurice O'Brien." Zelnick finally spoke to O'Brien about this himself and made the necessary substitution in the original return. (R. 246–266, 773, 795.) Miller, Zelnick and O'Brien shared the $4,000 paid by Oppenheimer (R. 254–255, 797, 799). At that time O'Brien also told Zelnick that he would try to channel Miller's cases through him (R. 800).

Ernest Bell. In March 1949, when Bell retained Miller in connection with a pending tax examination, and told him that agent Becker was handling the examination, Miller contacted peti-

tioner, who said that Becker was the "toughest agent in Albany," and that he would have the case transferred to Witt. About June 1949, petitioner asked Miller to come to his office with Bell's pertinent records. On that occasion he introduced Miller to O'Brien. After lunch, O'Brien, in petitioner's presence, gave Miller the original file on Bell and told him to see Witt to whom the case had been assigned. Miller and petitioner met Witt and all three went to petitioner's office, where petitioner told Witt how to prepare a no-tax report on Bell. Witt did so. Petitioner then told Miller to get about $1,000 from Bell. Witt, Miller and petitioner shared in the bribe received from Bell, with petitioner saying that his share would be split between him and O'Brien. (R. 282–285, 292–298, 676–680.) Subsequently Witt's recommendation was accepted by the Internal Revenue Service (R. 680).

Harold Van Loan. About September 1949, Van Loan, who was engaged in business in Springfield, Massachusetts, which was within the jurisdiction of the Boston office and for whom Miller had performed accounting services, retained Miller in connection with a tax examination of his 1947 return which was pending in the Boston office. Not knowing how to proceed in connection with a return which was pending in another office, Miller called petitioner. Petitioner told him to request the Boston office to transfer the case to

Troy on the ground that the taxpayer's records were in that jurisdiction. Petitioner also agreed to tell O'Brien to "watch out" for the case. Sometime later petitioner called Miller, told him that he had arranged for Witt to handle the case and asked Miller to come to his office. When Miller arrived at petitioner's office, Witt was there. Witt examined Van Loan's books and prepared a no-tax report as instructed by petitioner. Petitioner then told Miller to get $1,000 from Van Loan. Miller, Witt and petitioner shared this sum, petitioner saying that his share would be split with O'Brien. (R. 325–329, 627–630.) Witt's recommendation was accepted by the Internal Revenue Service (R. 631).

In the remaining cases, there is no evidence that petitioner was directly involved. They concern deals following the same pattern as those described, in which Miller, O'Brien and one of the agents were involved.[5]

During 1950, Miller gave an elaborate party at his home which petitioner, O'Brien, Zelnick, Ink-

[5] In the Osborn and Hensonville (R. 356–363, 816–823), Ingalls (R. 370–373, 829–832, 1258–1261), Krauss (R. 374–376, 837–839), Page (R. 348–351, 811–814), second Van Loan (R. 329–332, 340, 832–835), and New Hotel Walters (R. 299–305, 805–809), cases, Zelnick was the agent; in the McQuade (R. 316–325, 742–748), Barlow (R. 268–275), and Brown (R. 306–315, 726–730) cases, Inkeles; and in the New York Loan (R. 341–348, 640–646, and Reis (R. 364–369, 661–667) cases, Witt.

eles and Witt, and their wives, attended (R. 841, 1314–1315, 1343, 1395, 1407).

Following the Krauss case about January 1951, the last case as to which there was testimony (R. 374), Miller and Zelnick were questioned on March 13, 1951, by Treasury Department agents in connection with a De Stefano extortion case, not relevant here (R. 376–377, 842). After the questioning, they became excited and went to Albany, located O'Brien in a hotel and sought his help. O'Brien called petitioner. Miller told petitioner that (R. 844) "something had better be done for him, otherwise he was going to expose everybody he had dealings with" since (R. 382) "you are mixed up in this whole mess." Petitioner told Miller to calm himself and at midnight called Andrew Pinckney, Assistant District Attorney of Albany County, who was his good friend and who, petitioner said, was (R. 845) "the best man who could fix the case in Albany," and (R. 382) "who will be able to help us." During a meeting the next day with Miller, Zelnick, O'Brien and petitioner, Pinckney asked the names of those who would be involved in the exposure. Miller named petitioner, O'Brien, Witt, Inkeles, and Rourke. Further conversations followed among O'Brien, Miller, Zelnick, Pinckney and petitioner, but nothing was accomplished. (R. 377–378, 380–386, 842–849.)

At the close of the government's case, and again before its submission to the jury, defense counsel sought to have the indictment dismissed on the ground that the evidence did not establish an overall conspiracy (R. 1268–1270, 1630), but the court denied the motions saying that the question of an overall conspiracy was for the jury (R. 1270).

In its final charge to the jury, the court included the following (R. 1822–1823, 1824–1825):

> If there is a conspiracy and a defendant was a member of it at any time as alleged, such defendant would be guilty, although he was not one of the original members or though he ceased to participate to the very end of the conspiracy. A person may be a member of the conspiracy though his part therein be a subordinate one or be executed at a remote distance from the other competitors.
>
> * * * * *
>
> Evidence as to the acts by one or more of those who compose a conspiracy, if done in furtherance of it, is binding upon all even if some of them may not have specific knowledge of that particular act. But you are not to consider any of the acts of any of the alleged conspirators binding on any other defendant or as an overt act done in pursuance or to effect the object of the alleged conspiracy or scheme in the absence, first, of a finding by you that both

of them were parties to the alleged conspiracy. * * *

ARGUMENT

Petitioner contends (Pet. 10–15) that the evidence showed multiple conspiracies rather than one over-all conspiracy and that the conspiracy proved as to him was barred by the statute of limitations.[4] He concedes (Pet. 13) that "if this Court holds that there is only one conspiracy proved in this case, then there is no bar of the statutes of limitations, for it is clear that insofar as others of the defendants are concerned there were overt acts involving them subsequent to April 14, 1950, which is three years prior to the date of the filing of this indictment on April 14, 1953."

We submit that there was ample evidence from which a jury properly could have inferred a single conspiracy in which petitioner participated. See Statement *supra*. The facts point to a unified continuing scheme which was ini-

[4] The six-year statute of limitations (26 U. S. C. 3748) applies to offenses by revenue agents who conspire with others to defraud the United States. Although petitioner was not a revenue agent at the time most of the activities of the conspiracy occurred, it is not as clear as he seems to assume that the six-year statute would not apply to him. Under 18 U. S. C. 2, one may be punishable for causing an act to be done even though the offense is limited to a particular category of persons, like revenue agents, to which the causer does not belong. In any event, the issue is immaterial if one conspiracy was shown.

tiated by petitioner and Miller and continued with O'Brien's active participation; its common purpose was to settle fraudulently tax cases involving clients of Miller. The facts also point to general knowledge of such a conspiracy on the part of all the participants and to their participation therein.

That this was a continuing scheme, and not an *ad hoc* affair as petitioner suggests (Pet. 11), is clearly demonstrated by petitioner's statement to Miller in June 1947 that his [petitioner's] separation from the government would not (R. 206) "make any difference" and that he "would still be well connected with the Treasury Department"; by Miller's response that he would contact petitioner if anything came along that he could not handle and by Miller's conversation with Zelnick in November 1948, at the time of the Oppenheimer case, that a scheme for fixing cases was in existence in which petitioner, O'Brien, and other agents participated. Each person in the conspiracy knew that a general arrangement had been established, through petitioner, between Miller and O'Brien, to pass tax reports on Miller's clients, and each of the agents was required to join with and rely upon that basic arrangement to secure his share of the money obtained from Miller's clients. As the court below held, the facts of this case are thus much closer to *Blumenthal* v. *United States,* 332 U. S.

539, than they are to *Kotteakos* v. *United States*, 328 U. S. 750. See also *United States* v. *Rosenberg*, 195 F. 2d 583 (C. A. 2), certiorari denied, 344 U. S. 838, and *United States* v. *Ganey*, 187 F. 2d 541 (C. A. 2). The participation of each conspirator in each transaction is unnecessary where, as here, each member including petitioner served a definite function in the over-all scheme. The scheme by its very nature envisioned that its members would not participate in each transaction since different agents handled different cases and the personnel of the Internal Revenue Service was subject to change.

Petitioner's contention in reality amounts merely to the argument that the evidence does not show his active participation in the conspiracy in its later phases. However, as the court below pointed out (Pet. 23), there is no evidence that petitioner ever affirmatively disassociated himself from the conspiracy. On the contrary, there is affirmative evidence that, in 1951, he was such an important member of the combination that he was the person relied upon to save the others from prosecution (see Statement, *supra*, p. 11). Accordingly, since he was clearly a member, indeed a central member, of the conspiracy at its inception, he must be deemed to have remained a party to it until he was affirmatively shown to have withdrawn from it. *Hyde* v. *United States*, 225 U. S. 347, 369; *Pinkerton* v. *United States*, 328 U. S. 640, 646.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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